

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA

RICHARD TUSO, on behalf of
himself and others similarly
situated,

Plaintiff,

v.

NATIONAL HEALTH AGENTS, LLC, a
Florida company, et al.,

Defendants.

No. 2:20-cv-02130-JAM-CKD

**ORDER GRANTING DEFENDANTS'
MOTION TO DISMISS**

This matter is before the Court on National Health Agents, LLC ("NHA") and Interstate Brokers of America, LLC ("IBA") ("Defendants") Motion to Dismiss. Mot., ECF No. 19. Richard Tuso ("Plaintiff") filed an opposition, ECF No. 29, to which Defendants replied, ECF No. 32. After consideration of the parties' briefing on the motions and relevant legal authority, the Court GRANTS Defendants' Motion to Dismiss.¹

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¹ This motion was determined to be suitable for decision without oral argument. E.D. Cal. L.R. 230(g). The hearing was scheduled for February 23, 2021.

I. FACTUAL ALLEGATIONS AND PROCEDURAL BACKGROUND

Defendants NHA and IBA, two limited liability companies headquartered in Fort Lauderdale, Florida, place telemarketing calls promoting and selling the insurance services of other companies to consumers. Compl. ¶¶ 2-3, 23, 28, ECF No. 1. Between June and September 2020, Plaintiff, a resident of Roseville, California, received a number of unsolicited telemarketing calls from Defendants. Id. ¶¶ 49-51 (June 16, 2020 call), 52-53 (July 16, 2020 call), 54-56 (August 18, 2020 call), 57-60 (August 21, 2020 call), 61-62 (August 26, 2020 call), 81-82 (September 15, 18, and 29, 2020 calls). In response, Plaintiff filed this action on behalf of himself and those similarly situated, under the Telephone Consumer Protection Act ("TCPA"), 47 U.S.C. § 227, Compl. ¶ 8, which prohibits sending unsolicited, autodialed text messages and calls to cellular telephones. Id. § 227(b)(1)(A)(iii). Defendants now move to dismiss. See Mot.

II. OPINION

A. Request for Judicial Notice

Defendants request the Court take judicial notice of two exhibits: IBA and NHA's Florida Limited Liability Company Annual Reports. See Defs.' Req. for Jud. Notice ("RJN"), ECF No. 20. Plaintiff does not oppose this request. The Court finds both documents to be matters of public record and therefore proper subjects of judicial notice.

Accordingly, the Court GRANTS Defendants' Request for Judicial Notice. However, the Court takes judicial notice only of the existence of these documents and declines to take

1 judicial notice of their substance, including any disputed or
2 irrelevant facts within them. Lee, 250 F.3d at 690; see also
3 Gish v. Newsom, No. EDCV 20-755-JGB(KKx), at *2 (C.D. Cal. April
4 23, 2020) (explaining courts judicially notice only “the
5 contents of the documents, not the truth of those contents”).

6 B. Proper Venue

7 Defendants advance several arguments as to why Plaintiff’s
8 Complaint should be dismissed. Mot. at 3-12.² Their leading
9 argument is that Plaintiff has failed to establish that venue is
10 proper in this District. Mot. at 1, 3-5.

11 1. Legal Standard

12 A Rule 12(b)(3) motion attacks the complaint as not
13 alleging sufficient facts to establish that venue is proper.
14 See Fed. R. Civ. P. 12(b)(3). The plaintiff bears the burden of
15 establishing that venue is proper in the district in which the
16 lawsuit was initiated. Hope v. Otis Elevator Co., 389 F. Supp.
17 2d 1235, 1243 (E.D. Cal. 2005).

18 A civil action may be brought in: (1) a judicial district
19 in which any defendant resides, if all defendants are residents
20 of the State in which the district is located; or (2) a judicial
21 district in which a substantial part of the events or omissions
22 giving rise to the claim occurred. 28 U.S.C. § 1391(b).

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25 ² Defendants also argue that the Court lacks subject matter
26 jurisdiction, see Mot. at 5-10, and that Plaintiff have not
27 plausibly alleged any misconduct by NHA, see id. at 10-12, to
28 which Plaintiff responds the Court does have jurisdiction, see
Opp’n at 4-8, and that NHA is liable under an alter ego theory,
see id. at 9-10. Until the issue of venue is resolved, however,
the Court need not reach these additional arguments.

1 2. Analysis

2 The parties agree that venue is not proper in the Eastern
3 District of California under § 1391(b)(1), as none of the
4 Defendants are residents of California. See Compl. ¶¶ 2-6; Mot.
5 at 4. The parties, however, disagree about whether venue is
6 proper in the Eastern District under § 1391(b)(2), that is,
7 whether a substantial part of the events or omissions giving
8 rise to Plaintiff's claim occurred here. See Compl. ¶ 9; Mot.
9 4-5.

10 Defendants argue Plaintiff's two allegations - that (1) he
11 resides in the District, Compl. ¶ 1; and (2) the wrongful
12 conduct giving rise to this case was directed at Plaintiff in
13 this District, id. ¶ 9 - are insufficient to establish a
14 substantial part of the relevant events occurred in the Eastern
15 District. Mot. at 4-5. As Defendants highlight, Plaintiff does
16 not specifically allege that Defendants placed the calls from
17 this District, nor that he received the calls from Defendants
18 while in this District. Id. Notably, in opposition, Plaintiff
19 points the Court back to the same two allegations. Opp'n at 4
20 (citing to Compl. ¶¶ 1, 9). Thus, the narrow question before
21 the Court is whether Plaintiff has met his burden to establish
22 venue is proper under § 1391(b)(2) with these two allegations.

23 Insisting he has, Plaintiff relies on this Court's decision
24 in Neff v. Towbin Dodge LLC, No. 2:20-CV-00261-JAM-DMC, 2020 WL
25 6802188, at *2 (E.D. Cal. Nov. 19, 2020) (finding substantial
26 part of the events giving rise to TCPA claim took place in the
27 Eastern District of California "where the phone call was
28 directed and where the harm was inflicted"). In Neff, the

1 plaintiff alleged he resided in the Eastern District and
2 received the TCPA-violative calls to his cell phone here. Id.
3 at *1. From these allegations, the Court inferred that Neff had
4 received the communications in this district; and because the
5 plaintiff's injury, receipt of the communications, occurred in
6 the district, the Court found a substantial part of the events
7 giving rise to his claim occurred here and accordingly that
8 venue was proper in Eastern District of California. Id. at *1-
9 2. Neff therefore does support Plaintiff's general contention
10 that in TCPA actions, venue may be proper in the district where
11 Plaintiff received the calls.

12 However, Neff is of limited use to Plaintiff because the
13 allegations in the two cases are distinguishable. Specifically,
14 Plaintiffs' allegations here are more bare-bone and conclusory
15 than those in Neff. For instance, the Neff plaintiff
16 specifically alleged he received the calls to his cell phone
17 while here in the District. Neff, 2020 WL 6802188, at *1. By
18 contrast, here there is no such allegation. Instead, paragraphs
19 1 and 9 of the Complaint state only that "Plaintiff is a
20 resident of Roseville" and that venue is proper in this district
21 "because Plaintiff resides in this District and the wrongful
22 conduct giving rise to this case was directed to plaintiff in
23 this District." Compl. ¶¶ 1, 9. The Court finds these bare-bone
24 assertions unsupported by specific factual allegations are
25 insufficient to establish venue is proper in the Eastern
26 District. See Bell Atlantic Corp. v. Twombly, 550 U.S. 544, 570
27 (2007) (explaining at the motion to dismiss stage, the Court
28 need not "accept as true a legal conclusion couched as a factual

1 allegation"); see also Swartz v. KPMG LLP, 476 F.3d 756, 766
2 (9th Cir. 2007) (explaining that "[m]ere 'bare bones' assertions
3 . . . or legal conclusions unsupported by specific factual
4 allegations will not satisfy a plaintiff's pleading burden").

5 Because Plaintiff has not met his burden to establish venue
6 is proper here, his complaint is dismissed without prejudice.

7 C. Transfer

8 Instead of bringing a motion to transfer venue along with
9 their motion to dismiss, Defendants tack on the following
10 statement to their Motion: "if the court determines that venue
11 is improper, it may either dismiss the action or if it is in the
12 interests of justice, transfer the action to the action to a
13 district in which the action could have been brought." Mot. at
14 3-4. In support of this proposition, Defendants cite to King v.
15 Russell, 963 F.2d 1301 (9th Cir. 1992). Mot. at 4. In King,
16 the defendants originally requested transfer rather than
17 dismissal, yet the district court chose to dismiss the case on
18 the grounds of improper venue. Id. at 1304. The Ninth Circuit
19 affirmed, finding that the district court had not abused its
20 discretion. Id. at 1305. According to Defendants, King
21 instructs that "whether to dismiss for improper venue or
22 transfer venue is within the sound discretion of the district
23 court." Mot. at 4; Reply at 2. Defendants further suggest that
24 the proper venue for this case is the Southern District of
25 Florida, where both Defendants reside. Mot. at 1.

26 The Court, however, does not agree that King, a case in
27 which defendants requested transfer rather than dismissal and
28 the court dismissed, clearly authorizes transfer here, where

1 Defendants have only formally moved for dismissal rather than
2 transfer. If Defendants seek to transfer this case to the
3 Southern District of Florida, they should bring a motion to
4 change venue. C.f. Motion to Dismiss and to Change Venue Neff,
5 2020 WL 6802188 at *1 (specifically bringing a "Motion to
6 Dismiss for Improper Venue and, in the alternative, Motion to
7 Change to Venue to the District of Nevada").

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9 III. ORDER

10 For the reasons set forth above, Defendants' Motion to
11 Dismiss is GRANTED WITHOUT PREJUDICE. If Plaintiff elects to
12 amend his complaint, he shall file an Amended Complaint within
13 twenty (20) days of this Order. Defendants' responsive pleadings
14 are due twenty (20) days thereafter.

15 IT IS SO ORDERED.

16 Dated: March 2, 2021

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19 JOHN A. MENDEZ,
20 UNITED STATES DISTRICT JUDGE
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